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Supreme Court of the United States

OCTOBER TERM, 1975

74-858

74-859

HUGH L. CAREY, Governor of the State of New York, LOUIS J. LEFKOWITZ, Attorney General of the State of New York, SIDNEY A. FINE, Justice of the Supreme Court of the State of New York, First Judicial District and GEORGE BEISHEIM, JR., Justice of the Supreme Court of the State of New York, Ninth Judicial District,

Appellants, (74-858)

and

CURTIS CIRCULATION COMPANY, CONTINENTAL CASUALTY COMPANY,

Appellants, (74-859)

against

BERT RANDOLPH SUGAR and WRESTLING REVUE, INC.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR APPELLANTS CAREY, FINE BEISHEIM AND ATTORNEY GENERAL *PRO SE*

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Statement

This reply brief is submitted in response to the Brief for Appellees and the Brief *Amicus Curiae* of the Legal Aid Society of New York City.

I. New York's attachment statute fully complies with due process.

As we and the Curtis appellants have noted, due process is not an inflexible requirement, but rather must be considered in light of the situation at hand. *Mitchell* v. *W. T. Grant Co.*, 416 U.S. 600, 610. Rather than approach New York's attachment statute (Civil Practice Law and Rules, Art. 62) in that context, the appellees inexcusably seek to read *Mitchell* as inexorably and precisely requiring every element of the Louisiana sequestration statute upheld therein. This is plainly a gross distortion of *Mitchell.*

Appellees further contend that New York meets none of the *Mitchell* standards and in this respect go way beyond even the District Court opinion which only found "no meaningful opportunity to vacate an order of attachment" (J.S. 12a). That this is the commonly accepted understanding of the decision below is confirmed by several recent federal decisions. *Stanton* v. *Manufacturers Hanover Trust Co.*, 388 F. Supp. 1171 (S.D.N.Y. 1975); *Usdan* v. *Dunn Paper Co.*, 392 F. Supp. 953 (E.D.N.Y. 1975).*

To reply as to (1) the vendor's lien; Appellee's Brief, p. 26: Points II of both the Carey Brief (pp. 21-24) and Curtis Brief (pp. 31-32) amply demonstrate that lack of a vendor's lien does not make attachment subject to challenge on its face. *Mitchell,* 416 U.S., at 607-608, does not stand for appellee's proposition. It only shows Louisiana's interest in protecting a vendor's lien. New York has a similar interest in protecting against fraud.

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* It is interesting to note that both these cases upheld jurisdictional attachments under CPLR Art. 6201(1) against due process attack. Thus they are contrary to *Vath* v. *Israel,* 80 Misc 2d 759, 364 N.Y.S. 2d 97 (Sup. Ct., Queens Co., 1975), which is hardly controlling. *Vath's* alternate holding should be the decision. Cf. *Sutton* v. *Garcia,* 80 Misc 2d 690, 363 N.Y.S. 2d 695 (Sup. Ct., N.Y. Co. 1974).

(2) Risk of transfer or concealment. Appellee's Brief, p. 26 asserts there was no risk of this because the third party (National) had possession. This is wholly untenable. The convening decision rejected such contention (J.S. 17a-19a). As stated there (J.S. 19a), if there was no attachment "National would then be free, now as before, to turn the money over to Wrestling or to continue to withhold it".* If it were clear that the attachment did not change the situation, appellees presented "no real case or controversy," *Golden* v. *Zwickler,* 394 U.S. 103, 110 (1969). Or they should have moved under CPLR 6223 in the state court to vacate the attachment, as "unnecessary to the security of the plaintiff."**

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* In fact, a single judge should not have rejected the claim, but should have sent it on to the three-judge court. (Cf. J.S. 25a)

** At the time of the convening opinion, 377 F. Supp. 1055, the appellants raised abstention. (J.S. 19a). It was rejected but also passed on to the three-judge court (J.S. 25a) which implicitly rejected it, as it was not discussed. The answer of Curtis presents these defenses (App. 33a-34a).

As the District Court did not have occasion to treat *Huffman* v. *Pursue, Ltd.*, —— U.S. ——, 43 L. Ed. 2d 482 (1975), since it was not decided at the time, this Court should consider its applicability. While in *Huffman* the state court proceedings was viewed as quasi-criminal, there is clear language in *Huffman* to apply its principle of non-intervention to the instant case. *Huffman,* 43 L. Ed. 2d, at 492:

> "The component of Younger which rests upon the treat to our federal system is thus applicable to a civil proceeding such as this quite as much as it is to a criminal proceeding."

The interference by the federal courts with pending state court jurisdiction in the instant case is obvious. By instituting an independent suit in federal court, the appellees herein effectively prevented the state court from ruling on the correctness of the attachment via a 6223 motion. Moreover, by this action the appellees isolated the constitutional issue, which if it had been raised in a state court on a motion to vacate might not have been necessary to rule on, as the attachment on the merits might have fallen. *Cf. Richman* v. *Richman,* 41 A D 2d 993, 344 N.Y.S. 2d 52 (3rd Dept. 1973).

(3) The ease of proof. The appellees and the *amicus curiae* appear to be at odds on this issue. The appellees state that "fraud" is not easy of proof, following the opinion below (Br. p. 27) but the *amicus curiae* states the proof is too easy (A.C. Brief, pp. 8 *et seq.*), i.e. that plaintiff need only show a *prima facie* case and the defendant has a burden to show that the action "must inevitably fail". (A.C. Brief pp. 35 *et seq.*)

Actually the reality probably lies somewhere in between. In the myriad of New York decisions on motions to vacate attachments, at some point most any phrase can be seized on to support one's proposition. It must be clear that attachment in New York is a *discretionary* remedy. The plaintiff must convince the judge he is entitled to the remedy.

In a decision by then Judge Cardozo, many relevant principles are set forth. *Zenith Bathing Pavilion* v. *Fair Oaks S.S. Corp.*, 240 N.Y. 307, 148 N.E. 532 (1925). At 312, the Judge wrote "(w)hat is sufficient for a pleading may be insufficient for attachment". There must be "evidence" to sustain an attachment and at 313, "(p)rovisional remedies are not granted for the asking."

If, as appellees assert, ftn. 12 to Br., p. 27, Curtis' claim "is more fantasy than fact", then they should have moved immediately in the state court under Section 6223 to vacate the attachment. Suspicion or rumor cannot support an attachment in New York. Some "evidentiary facts," to be presented by plaintiff, are necessary. *A.M.F. Inc.* v. *Algo Distributors, Inc.*, 48 A D 2d 352, 358, 369 N.Y.S. 2d 460 (2d Dept. 1975).*

It defies criticism that a judicial officer has the discretion to vacate the attachment order "when evidence though not lacking altogether, may seem too weak or

* This is a definitive appellate decision upholding the constitutionality of attachment and refusing to follow the opinion below.

uncertain to justify the remedy", *A.M.F. Inc., supra,* at 361, quoting *Zenith Bathing Pavilion,* 240 N.Y. at 313. Obviously the New York Courts will not uphold attachments where there is a mere scintilla of proof. That appellees have never made a motion under Section 6223 to vacate does not mean that an early hearing on the validity is not available. Even in Louisiana there will be no early hearing if the defendant fails to affirmatively make a motion.

(4) Impact on debtor. The appellees are utterly nonsensical here. If "Sugar is a most substantial citizen . . ." (ftn. 13, to Br., p. 28) then he should be able to discharge the attachment, CPLR 6222. The instant action involves a commercial transaction.

(5) The post-order hearing. The plaintiff must in New York show or prove he is entitled to the attachment. When a Section 6223 motion is presented, assuming defendant has made a showing to vacate it on his papers, the burden shifts. Ultimately the judge must weigh the proofs.

II. The CPLR 6223 hearing may be legal or factual.

Appellees' Br. p. 38, contends that *Regnell* v. *Page,* Appendix B to our main Brief, now reported at 82 Misc 2d 506, denied the defendant a "hearing". Hearings take many forms. If a question of *law,* no evidence need be taken. If a question of *fact,* an evidentiary hearing may be held (Appellants' Br., p. 35). Obviously, under CPLR 6223, a motion can be made immediately to vacate the attachment, and a judge will "hear" the proponent and opponent. This is a "hearing". To grant an evidentiary hearing in every case would be to try the case on the merits when only the right to attachment is in issue. But it can be a factual issue, under Section 6223, whether the attachment is necessary to the security of the plaintiff. *Maitrejean* v. *Levon Properties, infra,* Point IV.

III. The fact that only a judge may grant an attachment disproves the claim of appellee.

Much or all of the constitutional discussion on the validity of *ex parte* pre-judgment remedies centers around four decisions of this Court. (1) *Sniadach* v. *Family Finance Corp. of Bayview,* 395 U.S. 337 (1969); (2) *Fuentes* v. *Shevin,* 407 U.S. 67 (1972); (3) *Mitchell* v. *W.T. Grant Co.,* 416 U.S. 600 (1974) and (4) *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.,* —— U.S. ——, 42 L.Ed. 2d 751 (1975). In three (*Sniadach, Fuentes,* and *Di-Chem*) the Court's decision invalidated the remedy. In *Mitchell,* of course, it was upheld. And the most obvious difference of *Mitchell,* lacking in all the other cases is that a judge, and not a court clerk, granted the remedy. This implies discretion, an examination of respective rights and a proof of need to be exercised. This is exactly the case in New York.

Di-Chem, supra, which appellees rely on does not affect the instant appeal at all. First, the opinion in *Di-Chem, id.* at 757 emphasizes that in *Mitchell* "(t)he writ, however, was issuable only by a judge upon filing of an affidavit going beyond mere conclusory allegations and clearly setting out the facts entitling the creditor to sequestration." It is only a further point—that Louisiana allows an immediate hearing where the writ can be dissolved absent proof by the creditor of his grounds for granting of the writ. No mention is made of "burden of proof." In New York, on the Section 6223 motion to vacate, the plaintiff must also present proof or evidence to support the initial issuance, or the attachment will be vacated.

Fundamental to *Mitchell* and *Di-Chem* appears to be that the State not allow one party to a dispute by an application to a ministerial official, to bring into play the power of the State. As undisputed, New York has judicial control of attachment from start to finish.

IV. In the context of granting and vacating attachment, burden of proof is not a vital consideration.

While it is true in some instances that where the burden of proof lies may be decisive, *Speiser* v. *Randall,* 357 U.S. 513, 525 (1958), in the instant case where the burden of proof lies on a motion to vacate is truly irrelevant. The law does not mention it and, depending on the circumstances, the judge can place it where he considers proper. This flows from the fact that a plaintiff in New York must show he is entitled to the attachment by competent proof on the *ex parte* application and again on any Section 6223 motion by the defendant to vacate. *Zenith Pavilion, supra.* However, in many situations, the proof of the grounds of vacatur, *i.e.* that it is unnecessary to the security of the plaintiff, may lie only with defendant. *Maitrejean* v. *Levon Properties,* 45 A D 2d 1020, 358 N.Y.S. 2d 203 (2d Dept. 1974).

Reliance upon *Armstrong* v. *Manzo,* 380 U.S. 545, 511 (1965), is misplaced. The burden of proof in New York does not change because the initial grant was *ex parte. Armstrong* involved setting aside a final judgment. This Court pointed out the real burdens the moving party faced. On the other hand, on a Section 6223 motion, plaintiff must still show facts to support attachment or, in other words, prove the grounds of his attachment.

And, as said in *Regnell* v. *Page* (Br., App. Carey *et al.,* p. 34):

> "That due process is necessarily violated by imposing the burden of proof on defendant is not nearly as clear as Sugar suggests (*Leland* v. *Oregon,* 343 U.S. 790; *U.S.* v. *Ill. Central R.R.,* 291 U.S. 457)."

And further *Regnell* goes on to show that the burden really is not on defendant in a fraud situation as the case at hand.

Appellees (Br. 34-40) totally confuse the state of the law in New York as to what a plaintiff must show to support

attachment. The numerous New York cases vacating attachments do so for a number of reasons. Appellees stating, the *nisi prius* court or the appeal court did so for "jurisdictional" grounds evidences misconception. In every case the *facts* as shown or proven by plaintiff failed to satisfy the grounds (CPLR 6201) for attachment. Attachment still is a discretionary remedy in New York.

The *amicus* brief also engages in this purposeful distortion of New York law. There are certain fundamental requirements to allow attachment. In New York, plaintiff must present proof of a *prima facie* case and or additionally the intent to defraud. *Amicus* (A.C. Br. p. 23) also explicitly concedes that the plaintiff or "creditor [in New York] need only sustain again [on a 6223 motion] the burden which was required of him in obtaining the initial attachment . . ."

CONCLUSION

The judgment below should be reversed.

Dated: New York, New York, October 30, 1975.

Respectfully submitted,

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